

LAW OPINION



Exemption on pharmaceutical patent should continue

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At present, pharmaceutical industry is a fast-flourishing sector in Bangladesh resulting in exporting products to more than 70 countries. The exemption that Bangladesh and other Least Developed Countries (LDCs) is enjoying from granting pharmaceutical patent up to 2016 has topped among the catalysts behind such boom. Withdrawal of such waiver shall require patent to be granted in pharmaceuticals to witness higher price, narrow market demand and poor public health. But, there are rays of hope! The wording of Para 7 of Doha Declaration 2001 and article 66(1) of Trade-Related aspects of Intellectual Property Rights (TRIPS) agreement offers us bases for hope. They speak of 'Duly Motivated Request' to get such further extensions after 2016. Finding grounds which may really motivate an international forum to offer such extensions for LDCs requires specific research. This is an attempt to find out the grounds which will really matter in such negotiation.

Doha Declaration and public health: Special treatment to public health was implicit in the Doha Declaration 2001. Paragraph-7 of the Declaration runs as follows: "...we also agree that LDCs will not be obliged, with respect to pharmaceutical products, to implement or to apply sections 5 and 7 of TRIPS agreement or to enforce rights provided for under these sections until January, 1, 2016, without prejudice to the rights of LDCs to seek other extensions of the transition periods as provided in art.66 (1) of TRIPS." Hence, by dint of para-7 of Doha Declaration LDCs are free from granting patent on product and

undisclosed information (sec 5 & 7 of TRIPS) in pharmaceutical sector.

Besides granting exemption from pharmaceutical patent up to 2016, para-7 leaves room for further extension in the clause "...without prejudice to the right of the LDCs to seek other extensions of the transition periods as provided in article 66(1) of the TRIPS agreement." According to article 66(1) of the TRIPS agreement LDCs are entitled to get exemption for 10 years from the date of application from complying with articles 3,4,5(dealing with patent) considering their economic, financial, and administrative constraints and for creating a viable technological base. In such case the council for TRIPS shall accord such extension upon 'Duly Motivated Request'. So, in pursuance of article 66(1) of TRIPS agreement it is possible to extend the exemption period for pharmaceutical patent after 2016 if the request is one which is persuasive supported by facts.

Finding convincing grounds:

Finding the grounds which can really motivate the council for TRIPS for granting such extension needs specific research as to status of Bangladesh in pharmaceuticals, manufacturing ability of drugs without reverse-engineering, percentage of persons pursuing self-medication due to poverty etc. However, following grounds may hold good in this regard:

1. Bangladesh can argue that its pharmaceutical industry is passing infancy period compared with that of USA, Switzerland, France, Japan, and Germany. In the list of 10 top pharmaceutical companies of the world by revenue as of March 2010, Switzerland had two companies



(Roche, Novartis), France one (Sanofi), Germany one (Bayer Healthcare). In 2008 among the largest 48 companies of the world in terms of revenue Japan had 10 companies. These countries provided pharmaceutical patent when their pharmaceutical industries attained maturity. Switzerland introduced pharmaceutical patent in 1977, France in 1960, Germany in 1968, Japan 1976. In terms of volume India's pharmaceutical industry ranks 3rd in the world. Still India provides only product patent from 2005. Carlos M. Correa (2002), a Professor of University of Buenos Aires writes that, "it is the relaxation

Indian patent law after 1970, which enabled India witness such a boom in pharmaceutical industry". On the other hand, according to Bangladesh healthcare and pharmaceutical report Q1-2011 Bangladesh ranks 67th globally. To be at par with those countries Bangladesh needs more time after 2016.

2. The number of people accustomed to self-medication due to inability to visit doctor can play a decisive role in this regard. According to a survey in 2005 titled "Exploring Health Seeking Behavior of Disadvantaged Population in Rural Bangladesh" it has been found

that about 30%-40% people rely on self-medication. People, here, pursue self-medication or OTC medicine mainly to avoid doctors' fee. If patent is granted in pharmaceuticals the prices of medicine will go higher and exacerbate the present healthcare system. So, it can be validly argued that Bangladesh should have the exemption for another period of 15-20 years after 2016.

3. Bangladesh can propagate that "public health" should not be viewed as a matter of trade yielding high return. It is a problem area which warrants both national and international efforts. Suppose, pat-

ent protection on AIDS vaccines raises the price very high making a number of patients unable to afford it and die consequently. Would the world community still remain silent allowing companies receive high return? The world conscience is supposed to respond and ensure supply of vaccines or at least negotiate with the traders to reduce the price. The method of compulsory license in national laws allowing generic producers to produce patented products might be well exercised on priority basis. Doha Declaration, TRIPS agreement, national laws-all speak of special protection to public health. So, restriction in trade, patent and high return is implicit in national and international IP laws. Restriction in this case is deemed to have been incorporated to ensure affordable healthcare system throughout the world. Hence, Bangladesh can claim the exemption on pharmaceutical patent to continue after 2016 until its healthcare becomes affordable to everybody.

4. As Doha Declaration was the creator of privileges for LDCs in pharmaceutical patent, they can very validly call for extension of duration mentioned by convening a review of the declaration.

Equality should be ensured among the equals. Equality among the unequal is itself a great inequality. As Bangladesh and other LDCs are not on a firm basis regarding public health, they need the exemption to be extended for another 15-20 years after 2016. It is going to be a hard earned one if not impossible. So, Bangladesh and other LDCs should be well equipped for such negotiation.

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LAW VISION

ABDUR ROKIB

Who will judge our Judges? It is a high profile debate in Bangladesh. We know every state has constitution, some have written some have unwritten. United Kingdom is one of the exceptions which have no written constitution. They believe their Parliament is sovereign and given power to remove Judges. This power was from the 1701 Act of Settlement and is now contained in section 11(3) of the Supreme Court Act 1981. But we have seen the power had never been exercised in England and Wales.

The United State has written



Constitution and it is clearly mentioned in the constitution how to remove a judge from his post. The right to impeach public officials is secured by the U.S. Constitution in Article I, Sections 2 and 3, which discuss the procedure, and in Article II, Section 4, which indicates the grounds for impeachment: "the President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanours." The history says that they have impeached one justice of the Supreme Court, and eleven federal judges through this process.

The Bangladesh Constitution Article 96(2) give rights "A Judge shall not be removed from office except in accordance with the

following provisions of this article." We have seen the Constitution gives guideline to form a Supreme Judicial Council to remove a judge from his post. The Council will consist with three members (Chief Justice and two next Senior Judges). This Council is given power to make an inquiry for any 'gross misconduct' done by judicial officer and they report it to the President. It is the President who can remove a judge from his post [Article 96 (6)].

The Pakistan Constitution has

also an option of Supreme Judicial Council under Article 209. Judges of Supreme Court can not be removed from his post unless and until council report as guilty to President. The President may remove a judge from his post under Article 209 clause 6(b). The Indian Constitution in Chapter 4 (The Union Judiciary) at Article 124 and Clause 4 defines, "A Judge of the Supreme Court shall not be removed from his office except by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity."

Recently the Berlin based non government organization Transparency International (TI) blast a bomb in South Asia. TI Pakistan reports that Pakistan Judiciary is the 6th most corrupt sector in the country. To protect their judiciary Chief Justice started 'Jihad' against corruption. In addition Pakistan Parliament introduced a new bill of 'accountability law 2010'. The opposition party Pakistan Muslim League (Nawaz) demanded to bring judiciary under this law. According to Global Corruption Report 2007 Indian Judiciary is also corrupt and they are trying to improve it. The Indian Parliament introduced the Judicial Standards and Accountability Bill on December 1, 2010.

Transparency International Bangladesh reported Judiciary is the top most corrupt service sector in Bangladesh. On response of this report Chairman of Anti Corruption Commission said on media that "The TIB survey doesn't give an overall corruption scenario, but a partial view. Corruption in the country is very deep rooted." The government reaction was not so positive after that the Chief Justice forms a prove committee to find out corrupt people in the Judiciary. Does this process will remove corruption and ensure transparent judiciary is a million dollar question.

In Bangladesh judicial accountability is a debate. On November 29, 2010 Law, Justice and Parliamentary Affairs Committee invited Supreme Court Register to appear before the committee. The judiciary rejected the appeal on the plea that it is not accountable to parliament for its activities. On response of it the Chief Justice said "none is superior among judiciary, parliament and executive branch of the state. They are complementary to each other. The judges are accountable only to Almighty and the people. They express their accountability through the judgments to the people."

In reaction, Suranjit Sen Gupta,

Chairman of the Parliamentary Committee said that as per constitution parliament is the highest seat of authority. As the people hold the supreme authority and they bestowed their power on the elected members of parliament, it is the parliament who holds the authority over all the organs of the state. He opined that the judiciary should also be accountable to parliament. A retired judge of higher judiciary thinks that it is the parliament to whom the judiciary should remain accountable. Alternatively a practicing lawyer and a constitutional expert supported the opinion of the Chief Justice when asked by the media on the issue. He also said that if the judiciary does not remain independent, the majority party will try to dictate judiciary at its will.

In United Kingdom we have seen judiciary is accountable to parliament and judiciary is given power to declare any law incompatible under Section 4 of the Human Rights Act 1998. There is a good check and balance of power between these two organs. Under written Constitution US Parliament have impeachment power and they can remove any judge from his post through a democratic way. For better democracy Pakistan has introduced "Accountability Law 2010". For transparent judiciary India is enacting 'Standards and Accountability Act 2010'. But in Bangladesh accountability of judiciary is still a debate. We believe for the good democracy and rule of law the legislature, the executive and the judiciary will balance their power. The main actor of the legal system should consider that this is the time of making a people friendly Constitution. Now people deserve a transparent judicial system and friendly democratic Bangladesh.

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RIGHTS CORNER



Medical malpractice can be a serious issue

MEDICAL malpractice is a term that refers to any medical mistake made by a doctor, or other medical professional, that leads to personal injury or wrongful death. Medical malpractice can be the result of negligence on the part of the doctor, nurse, hospital, or other medical staff. Medical negligence occurs when medical personnel fail to perform their duties in a way that meet the standards of conduct for the medical profession.

In order to have a valid medical malpractice case, there are typically four fundamental elements that must be present. They are 1. duty, 2. medical negligence, 3. Patient injury and 4. Causation. Duty is a legal element that establishes a requirement between a doctor, nurse or other medical professional and their patient to treat said patient to the accepted medical standard of care. Medical negligence is a medical professional's deviation from the accepted medical standard of care.

These standards have been developed over hundreds of years of medical study. If a doctor or other medical professional does not adhere to these standards, then he or she is said to be negligent.

Undue injury is a requisite of a meritorious medical malpractice claim. Medical malpractice is a form of civil tort, and all tort claims require some form of damages for which to seek compensation or other legal remedy.

The fourth part of building a good medical malpractice case is showing how the medical negligence caused undue injury to the patient. Causation

means that the health care professional's breach of the standard of care caused or contributed to causing some harm to the patient.

Of course, in reality, medical malpractice cases are very complex. The laws are fairly straight forward, but proving the entire element in practice is very difficult. It is important for anyone considering a medical malpractice lawsuit to talk to an experienced medical malpractice lawyer to evaluate the case and get real legal advice and options.

In Bangladesh, the exercise of medi-



cal malpractice is a common phenomenon. Everyday lots of people are becoming victims of medical malpractice. Lack of proper knowledge about medical exercise and absence of comprehensive law indulged the professionals to commit such malpractice. In addition, there is no proper co-coordinating body to regulate such practice. In this situation a comprehensive law relating to medical malpractice can enforce the rights of the innocent victims.

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